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SOL (MSHA) V. R. ROTHERMEL & TRACEY AND PARTNERS
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDINGS Docket No. PENN 88-155 A.C. No. 36-01836-03529
v.	
RANDY ROTHERMEL, INDIVIDUALLY AND D/B/A TRACEY & PARTNERS, RESPONDENT	Docket No. PENN 88-156 A.C. No. 36-01836-03530 Docket No. PENN 88-60 A.C. No. 36-01836-03528
	Tracey Slope

DECISION

Appearances: Anita Eve, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary; Mr. Randy Rothermel, Tracey and Partners, Klingerstown, Pennsylvania for the Respondent.

Before: Judge Weisberger

Statement of the Case

In these consolidated cases the Secretary (Petitioner) seeks civil penalties for alleged violations by the Operator (Respondent) of various safety standards set forth in Volume 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard in Harrisburg, Pennsylvania, on August 8 Ä 9, 1988. Donn W. Lorenz, Harry W. Kern, Victor G. Mickatavge, James Schoffstall, and William C. Hughes testified for Petitioner. Randy Rothermel and Cindy Rothermel testified for Respondent. Respondent also called as witnesses William C. Hughes, Donn Lorenz, James Schoffstall, and Harry W. Kern.

Neither Petitioner nor Respondent filed a Post Trial Brief or Proposed Findings although time was allowed for such to be filed.

On December 14, 1988, Petitioner filed a Motion to Vacate Citation No. 2676409 and Dismiss the Related Civil Penalty Proceeding. This Motion was not opposed by Respondent, and it is hereby granted.

Stipulations

At the hearing the Parties indicated the following facts were stipulated to:

1. The Tracey Slope Mine is owned and operated by the Respondent, Randy Rothermel.

2. The Tracey Slope Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

3. The presiding Administrative Law Judge has jurisdiction over these proceedings pursuant to 105 of the Act.

4. The citations, orders, modifications and terminations, if any, involved herein, were properly served by a duly authorized representative of the Secretary of Labor upon an agent of the Respondent at the dates, times, and places stated herein, and may be admitted into evidence for the purpose of establishing their issuance.

5. The Parties stipulate to the authenticity of their exhibits but not to relevancy or the truth of the matters asserted therein.

6. The computer printout reflecting the Respondent's history of violations is an authentic copy and may be admitted as a business record of the Mine Safety and Health Administration.

7. The total annual production of the Tracey Slope Mine was approximately 3,240 tons of coal per year.

8. The Tracey Slope Mine is no longer in operation.

At the hearing, the Parties agreed to submit a post hearing stipulation as to Respondent's history of violations. On December 19, 1988, in a telephone conference call, with Counsel for Petitioner and Respondent's owner, it was stipulated that the history of the previous violations should be determined based on the fact that the approximate number of assessed violations in 24 months prior to the issuance of the first Citation in these cases are 40.

I. Docket No. PENN 88Ä60

Citation No. 2676133

30 C.F.R. 75.1704, as pertinent, provides that ". . . two separate and distinct travelable passageways," which are to be designated as escapeways and ". . . which are maintained to

insure passage at all times of any person, including disabled persons, . . . shall be maintained in safe condition . . . ." In essence, Donn W. Lorenz, a MSHA Inspector, testified that when he inspected Respondent's mine on March 24, 1987, of the two escapeways, one was "inaccessible" due to a rock fall. Government's Exhibit 1 depicts that the area that was described by Lorenz as being "inaccessible," was in the path leading from the face to the fourth level, which was the return escapeway. It appears to be the Respondent's position that the regulations do not require a second escapeway while a slope is being developed, and that in either event, as indicated by the cross-examination of Lorenz, access from the working face to the fourth level return escapeway could have been obtained by going inby to the main slope intake escapeway, and then traveling in a northerly direction to the intersection with the fourth level and then turning west to the return escapeway. I find however that section 75.1704, supra, by its clear language requires "two separate and distinct" escapeways, and that there is nothing further in the language of this section which would exclude its applicability to a developing slope. Also, I have taken into account Lorenz's testimony that access from the working face to the return escapeway was "inaccessible" due to a rock fall, and the cross-examination of Respondent's owner Randy Rothermel which indicates that, in essence, although the escape route was travelable, it would not be possible for a disabled person to traverse that route. Accordingly, I find that on the date in issue, the Respondent's mine did not have two separate and distinct escapeways maintained in a condition safe enough to ensure passage of all persons including disabled ones. Thus I find that there has been a violation of section 75.1704, supra.

The Citation that was issued characterized the violation herein as being significant and substantial. The only evidence bearing on this issue consists of statements by Lorenz that the escapeway was "inaccessible" due to a rock fall, and that it was "reasonably likely" that one traveling this way would "get hurt," resulting in lost work days or restricted duty (Tr. 30). Lorenz's testimony does not reveal any facts he took into account in arriving at the above opinions. Although a rock fall would clearly contribute to an element of danger to safety, in view of the fact that there is no evidence before me with regard to the extent of the rock fall and its quantity in relation to the traveled path, I have no basis to conclude that there was a reasonable likelihood that the hazard contributed to would result in an injury, and that the injury in question would be of a "reasonably serious nature." (c.f. Mathies Coal Company 6 FMSHRC 1, 3Ä4 (January 1984)). Accordingly, I conclude that it has not

been established that the violation herein was significant and substantial. (See, Mathies Coal Company, supra). In the same fashion, for the same reason, I cannot conclude that the violation herein was any more than a moderate degree of gravity. Further, I conclude that Respondent was negligent to only a moderate degree, as the escapeway was travelable before a roof breaking occurred, over which the Respondent had no control (Tr. 30Ä31). Based upon this analysis as well as the remaining statutory factors contained in section 110(i) of the Act, I conclude that a penalty herein of $100 is appropriate.

Order No. 2676178

Harry W. Kern, an inspector for MSHA, testified, in essence, that on July 22, 1987, he requested permission from Rothermel to enter the mine to make a spot inspection. Kern said that Rothermel told him that he (Kern) was not allowed in the mine to make an inspection. Accordingly Kern testified that he then issued Order No. 2676178, a section 104(b) Order. Rothermel did not contradict this latter statement attributed to him, but indicated that on the date the Order was issued, there was a second escapeway, as the face had advanced from where it was at the date the original citation was issued, and accordingly the third slant was open all the way to the return escapeway (the fourth level).

I find, based upon Kern's uncontradicted testimony, that on July 22, 1987, Rothermel refused him permission to make an inspection. Accordingly, I find that this Order was properly issued. This Order was characterized as significant and substantial, but there was no evidence adduced on this point. I conclude that violation herein is not significant and substantial.

Citation No. 26767135

Lorenz testified that, in essence, when he inspected Respondent's mine on July 12, 1987, he did not observe any permanent stoppings in the gangway or fourth level which was the third open crosscut outby the working face. It was further his testimony that the ventilation map of Respondent's mine so indicates permanent stoppings in the third open crosscut outby the face. Rothermel, in essence, conceded that there were no permanent stoppings in either the first, second, or third slants or the fourth level. However, he testified that when he took the mine over, there was a waiver which indicated that permanent stoppings did not have to be made out of cinder blocks. However, such a waiver was not offered in evidence, and Rothermel indicated that the waiver did not specify the type of materials to be used to construct the permanent stoppings. It was further Rothermel's testimony that in 1982, when he received a citation

for a permanent stopping, he was told by special investigators that all he had to install was plywood to separate the intake and return air. It was further Rothermel's statement that subsequent to the Citation in issue, he conferred with Jim Schoffstall, Jerry Farmer, and Ed Blank, MSHA Officials, and explained to them that he had intended to put an overcast where the stopping should have been, and therefore had not installed permanent stoppings. Rothermel indicated that the MSHA Officials told him that a double brattice was sufficient. It further was Rothermel's statement that, because the slope was being developed and was at most 100 feet from the blasting, permanent stoppings could not have been installed as they would have been blown out of the slope.

I conclude, based upon Lorenz's testimony, and not contested by Respondent, that on the date in question there was no permanent stopping at the third crosscut outby the face. Such a stopping appears to be indicated on the ventilation map. Further, the ventilation plan in effect at the time, (GxÄ2), indicates that permanent stopping "will be constructed of concrete blocks, cinder blocks, sheet metal or other fire-resistant material." I find that there was insufficient evidence to conclude that there was any waiver in effect, which would have allowed for the placement of stoppings at the third open crosscut outby the face, of materials other then those described in the plan. Accordingly, I find that inasmuch as there were no permanent stoppings at the third open crosscut outby the face as required by the plan and map, the plan has been violated and hence a violation of 30 C.F.R. 75.316.

Citation 2676135 issued by Lorenz alleges the violation to be significant and substantial. However, there was no evidence adduced to support such a conclusion. Accordingly, I find that the violation herein was not significant and substantial. There is no evidence that the air on the working section was insufficient. Also there is no evidence of the contribution to any hazard as a result of the stoppings in question being of brattice, as testified to by Rothermel, rather than of the construction required in the plan. Nor is there any evidence that the difference in construction caused any increment in any hazard. Accordingly, I find that it has not been established that the gravity of the violation herein is more than low. Further, based upon the observations of Rothermel's demeanor, I find that he was truthful in his testimony, in essence, that he acted in good faith in relying upon a waiver and conversations with MSHA Officials in constructing a stopping of brattice material. Accordingly, I conclude that the Respondent's negligence herein is low. Taking into account these factors as well as the other statutory factors contained in section 110(i) of the Act as stipulated to by the Parties, I conclude that a penalty herein of $20 is appropriate.

Order No. 2677518

Victor G. Mickatavge, a MSHA Inspector, testified that on July 22, 1987, he returned to Respondent's mine to perform a follow up inspection. He said that Rothermel told him that he (Mickatavge) was not to inspect the mine and he was not allowed entry. Mickatavge accordingly issued Order 2677518 predicated upon a violation of section 104(b) of the Act. Rothermel did not deny having refused Mickatavge permission to inspect the mine. It therefore is concluded that this Withdrawal Order was properly issued. However, there is no evidence to conclude that it was significant and substantial.

Citation No. 26767136

Lorenz testified that on March 25, 1987, the fifth level was not depicted in the last ventilation plan received by MSHA from Respondent in June 1980. He indicated that this plan depicted development only to the third level. James Schoffstall, an inspector supervisor for MSHA, indicated that development at the fourth and fifth level was beyond that depicted in the ventilation plan (GxÄ2), which was approved in 1984. Rothermel indicated that for the last 12 years he has been submitting ventilation maps to MSHA, and that the last one in 1987, had been picked up by MSHA from Respondent's engineer Al Reidel. He also maintained, in essence, that the development of the fifth level would have the same ventilation as the third level, as it did not change the water gauge which created the vacuum on the fan to draw air. I find, based upon the testimony of Schoffstall and Lorenz, that on the date in issue, active workings at the fifth level had not been included or projected on a ventilation plan which MSHA had received from Respondent. Specifically, I note that 30 C.F.R 75.316Ä1 requires an operator to submit a map containing "*** (6) Projections of anticipated mine development for at least 1 year*** (8) All underground workings with the active working sections delineated." Inasmuch as the underground workings at the level 5 were not set forth nor projected in the most recent map on file with Petitioner, I find that Respondent herein violated section 75.316Ä1, supra. I find Rothermel's testimony insufficient to establish that any map containing the above information was filed with Petitioner. I do not find any merit to Respondent's argument, in essence, that it be relieved of any responsibility to file such a plan, as development of the fifth level would have been the same as development of the third level.

I find that no evidence has been adduced by Petitioner to establish either the gravity of the situation of the violation or the degree of Respondent's negligence. Based upon the lack of evidence in these areas, as well as the remaining statutory factors of 110(i) of the Act, I conclude that a penalty herein of $20 is appropriate.

Citation No. 2676225

Kern testified, in essence, that he received information from the Denver MSHA Office that Respondent had not filed a Quarterly Employment and Production Report for the first quarter of 1987, as required by 30 C.F.R. 50.30. The Respondent did not present any testimony or other evidence to rebut Kern's testimony. Accordingly, I find, based upon Kern's testimony, that Respondent herein violated 30 C.F.R. 50.30. No evidence was presented with regard to Respondent's negligence in this matter, nor was any evidence presented with regard to the gravity of this violation. Taking into account the lack of these factors, as well as the remaining statutory factors in section 110(i) of the Act, I conclude a penalty of $20 as assessed is appropriate.

Citation No. 26776177

30 C.F.R. 49.2 as pertinent, provides, in essence, that an operator shall either establish two mine rescue teams or enter into an arrangement for mine rescue services except where alternative compliance is permitted for small and remote mines, or except for those mines operating under special mining conditions. There is no evidence in this case that the requirements for these two exceptions have been met.

Kern testified that, in general, the MSHA District Offices are notified when a rescue service no longer covers a mine. He further testified that when such a circumstance occurs, the procedure is for the District Office to mail a letter to the local MSHA Office advising it of the same and indicating that a citation is to be served. According to Kern such a letter was received and a citation was served upon Respondent. No testimony was offered by Respondent nor was any evidence adduced by Respondent to rebut the testimony of Kern.

At most, Kern's testimony, based upon his personal knowledge, established that he received a letter from another MSHA Office advising him to serve a citation. However, there was no documentary evidence, nor any testimony based upon personal knowledge from which I could reasonably conclude that, in fact, the company that had previously arranged to service Respondent had terminated its relationship. Nor was any evidence presented before me to establish that Respondent did not have its own mine rescue team. Thus, I must conclude that it has not been established that there has been any violation herein of section 49.2, supra. Accordingly, this Citation must be dismissed due to lack of proof.

II. Docket No. PENN 88Ä155

Order No. 2932285 and Citation No. 2932286

According to Lorenz, on October 1, 1987, there was 3 to 15 percent of methane in the working section in the gangway approximately 30 feet inby the No. 3 Chute. He indicated that methane will explode when it is in the concentrations of 5 to 15 percent. In detecting the methane he used a National Mine Service methane detector. He issued Withdrawal Order No. 2932285 under the provisions of section 107(a) of the Federal Mine Safety and Health Act of 1977, providing for withdrawals from the mine in the event of "imminent danger." In addition, Lorenz also issued Citation No. 2932286 citing Respondent for violating 30 C.F.R. 75.308 which provides, in essence, until the air at the working face is less than 1.0 percent, power shall be cut off and no work shall be permitted, and that if the air contains more than 1.5 percent, then all persons shall be withdrawn, and all power shall be cut off. According to Rothermel, the methane testing by Lorenz, which resulted in the Withdrawal Order and the above Citation, occurred at approximately 11:00 a.m., when coal had just been fired, which is the time when methane is normally released. On cross-examination, Lorenz indicated that subsequently on October 1, at approximately 1:30 p.m., at Rothermel's request he checked for methane and in the monkey it was 1.2 percent, and in the gangway 1.7 percent. Lorenz's testimony, that at the location tested in the working section, there was between 3 to 15 percent of methane, has not been rebutted. Although there were no workers doing anything at the time, there was power in the section. Given these uncontradicted statements, I find that the Withdrawal Order No. 2932285 was properly issued and Respondent was in violation of section 75.308 as cited.

According to Lorenz, the amount of methane detected was in the explosive range, and a resulting explosion would be "rather violent," (Tr. 159). Inasmuch as there were miners in the vicinity of the high methane, and power was on in the section, I find the violation herein to be significant and substantial. (See, Mathies, supra). In the same fashion, I find that the gravity of the violation herein to be high. In essence, it is Respondent's position that it was not negligent in having miners remain in the vicinity of the high methane reading, as they were sitting in close proximity to a ventilation tube providing fresh air to remove the methane, and if they had left this position, they would have had to traverse an area of high methane. Respondent also appears to maintain that the release of methane was highest when coal is fired, and that release of high methane at that time is normal. I find however, that the dictates of section 75.308, supra, unequivocally mandate withdrawal "from the area of the mine in danger thereby to a safe area," and cutting

off all electrical power whenever the air contains more then 1.5 percent of methane. Although the release of methane upon firing might have been a normal occurrence, I find Respondent negligent to a high degree in not having had the power shut off until methane levels safely returned to less than one percent. In the same vein, I find Respondent highly negligent in not having removed all its miners from the entire area of the mine endangered by the release of excessive amounts of methane. Taking these factors into account, as well as the remaining statutory factors in section 110(i) of the Act, I find the assessed penalty herein of $1000 to be appropriate.

Citation No. 2932287

Lorenz also issued Citation No. 2932287 alleging that although Respondent had a permissible flame safety lamp with which tests were made for methane, Respondent did not have an approved methane detector, and hence violated 30 C.F.R. 75.307Ä1. This section, in essence, provides that subsequent to December 31, 1970, an approved methane detector "shall be used for such test," and that a permissible flame safety lamp may be used as a "supplementary testing device." Respondent has not contradicted Lorenz's testimony that it did not have a permissible methane detector. It appears to be Respondent's position that either a methane detector or a permissible flame safety lamp is permissible. However, I find that according to the clear language of section 75.307Ä1, the use of permissible flame detectors is mandated and that a flame safety lamp may be used in addition to the methane detector, but not in substitution thereof. (See, Webster's New Collegiate Dictionary, 1979 edition, which defines supplementary as "added as a supplement," and supplement as "1. something that completes or makes an addition.") Hence, I find that section 75.307Ä1 was violated herein.

Although the citation alleges the violation to be significant and substantial, there were not facts presented to establish that Respondent's failure to have a methane detector was significant and substantial specially in light of the fact that it had a safety flame lamp. Lorenz's testimony appears to indicate that generally a methane tester is safer than a safety lamp, in that a safety lamp could sometimes go out in high concentrations of methane, and the gauze in the lamp could be ignited, causing an accident. However, there was no proof of the specific hazard contributed to by the violation herein, nor was there any proof of any likelihood that any hazard contributed to would result in an injury of a reasonably serious nature. Hence, I find that the violation herein has not been established to have been significant and substantial. For the same reasons, I find the gravity of the violation herein not to have been established to have been more than low.

Although the violation herein might have resulted from Respondent's misunderstanding of section 75.307Ä1, supra, I find this section is clear in its requirements. Hence Respondent is found to have been negligent herein to a moderate degree in not following the clear dictates of the regulation. Considering these factors, as well as the remaining factors in section 110(i) of the Act, as stipulated to by the Parties, I find that a penalty herein of $50 to be appropriate.

Citation No. 2932288

Lorenz further testified that subsequent to the issuance of the 107(a) Withdrawal Order (Order No. 2932285), he told Rothermel to withdraw from the mine, and the latter indicated that he was going up No. 2 Chute to drill and shoot. He said that Rothermel took his tools and crawled through the No. 2 Chute. This testimony has not been rebutted by Respondent. Accordingly, I find that Respondent did not obey the Withdrawal Order and hence Citation No. 2932288 was properly issued. I have previously found that the underlying condition of high methane levels which gave rise to the Withdrawal Order No. 2932285 posed an imminent danger. As such, I find that Rothermel, in refusing to vacate the effected area in spite of being told by Lorenz to vacate, acted with a very high degree of negligence. The gravity of this violation was high, as Rothermel would have been subjected to high concentrations of methane. Taking these factors into account, as well as the remaining factors in section 110(i) of the Act, I find that the assessed penalty of $2000 is appropriate.

Citation Nos. 2932309 and 2932310

On the same date, October 1, 1987, Kern issued Citation Nos. 2932309 and 2932310 alleging violations of 30 C.F.R. 75.301 concerning the quantity of air reaching the last open crosscut in the No. 2 Chute off the fifth level East gangway, and the face of the West monkey of the fifth level East gangway, respectively. In the Citations he noted the quantity of air at the last open crosscut to be only 3950 cubic feet per minute with a methane reading of 2 percent. In the face he noted the air quantity of 1291 cubic feet per meter with a methane reading of 5 percent. Section 75.301, supra, provides that the minimum quantity of air reaching the working face shall be 3000 cubic feet a minute. Respondent did not rebut the finding of Kern as to only 1291 cubic feet per minute at the face. Accordingly, I find a violation of section 75.301, supra, as alleged. Section 75.301, supra, further provides that in all active workings ". . . the volume and velocity of the current of air shall be sufficient to dilute, render harmless, and to carry away, flammable, explosive, noxious, and harmful gases, and dust, and smoke and explosive

fumes." It further provides that the authorized representative of the Secretary ". . . may require in any coal mine a greater quantity and velocity of air when he finds it necessary to protect the health or safety of miners." In this connection, Kern presented his opinion that there was not enough air present to remove the concentrations of methane found. Respondent did not rebut this opinion or offer any contrary evidence. Accordingly, I find that section 75.301, supra, was violated herein as indicated in Citation Nos. 2932309 and 2932310.

Rothermel testified that the only machinery which was in operation when the Citations were written was a nonpermissible fan. I find, however, that what is critical is not the situation at the precise moment the Citation was issued, but I must rather take into account the presence of undiluted excess methane in the normal mining cycle which includes blasting. Based upon the previous testimony of Lorenz, I conclude that excess undiluted methane does present a situation where there is a definite safety hazard of an explosion with a reasonable likelihood that this hazard will result in an injury of a reasonably serious nature. Thus, the violation herein can be characterized as significant and substantial. For essentially the same reasons, I find the gravity of this violation to be relatively high. I find that the only evidence with regard to Respondent's negligence herein consists of testimony by Rothermel with regard to the placement of a tube from the fan to provide air to clear methane from the area. Since Respondent was making some attempts to dilute the methane I find that it acted herein with moderate negligence. Taking these factors into account, as well as the remaining statutory factors in section 110(i) of the Act, I find a civil penalty of $750 for a violation of Citation No. 2932309 and a civil penalty of $750 for a violation of Citation No. 2932310 to be appropriate.

Citation No. 2932312 and Order No. 2932313

Kern, on October 2, 1987, found with regard to Respondent's fan, used to ventilate the working section on the fifth level, that its glands were loose and its wires were not protected. He thus issued Citation No. 2932312 alleging the fan to be nonpermissible and thus in violation of 30 C.F.R. 302Ä4(a). This latter section provides that a fan used to provide ventilation of the working face ". . . shall be of a permissible type, maintained in permissible condition . . . ." The Respondent did not present evidence as to the specific condition of the fan, but indicated that it had used the fan for some time. Respondent moved to vacate the Citation on the ground that it had a waiver for this fan, and it was not notified that this waiver, which was for the second level, and used for the third and fourth levels, could not be used for the fifth level. Neither the waiver nor its contents

were offered in evidence, (Rothermel indicated that his records had been burned). As such, I can not find that Respondent was relieved from the responsibility of complying with section 75.302Ä4(a) with regard to the fan in issue. I thus find that Respondent herein did indeed violate section 75.302Ä4, supra. In light of this conclusion, Respondent's Motion to Vacate the Citation is denied.

Petitioner has alleged that the violation herein was significant and substantial, but has not presented any evidence which would tend to establish that the specific condition of the fan, which rendered it nonpermissible, created any discrete safety hazard which resulted in a reasonable likelihood of an injury of a reasonably serious nature. As such, I must find the violation herein not to be significant and substantial (Mathies, supra). In the same fashion, I can not find that the evidence herein establishes the violation to be other than a low gravity. I find, based upon observations of Rothermel's demeanor, that the Respondent herein acted in good faith in believing that it had a proper waiver allowing it to operate the fan in question. Accordingly, I find that Respondent's negligence herein to be low. Taking these factors into account, as well as the remaining statutory factors, I find a penalty herein of $20 to be appropriate.

Approximately 20 minutes after the issuance of the above Citation, Kern issued Withdrawal Order No. 2932313 which provides that ". . . Rothermel stated that he would not remove the auxiliary electric fan from the working section." Respondent has not presented any evidence to rebut this statement. Hence, I find this Order to have been properly issued.

III. PENN 88Ä156

Citation No. 2932307

Kern testified that when he was at the mine on September 10, 1987, Respondent did not have an updated map. He indicated he believed the date of the last mine map was 1986, and that he knows it was more than a year since the last map was submitted. Respondent did not offer any cross-examination of Kern, and hence his testimony was not rebutted. Schoffstall, testifying for the Respondent, indicated that Respondent's last map was submitted in April 1985, and he was "fairly certain" it set forth the third level (Tr. 307). Testimony presented with regard to other citations discussed in this decision indicates that Respondent, at the time the Citation was issued, was working on the fifth level. Since it was not contradicted that the last filed map went to the third level, it must be concluded that Respondent did not have an updated map. As such, it had been established that there was a

violation of 30 C.F.R. 75.1200 which provides, in essence, that an operator shall have an accurate "and up-to-date map." I do not find that this violation was any more than a low level of gravity. Further, Rothermel had told Kern that he had requested an engineer to prepare an updated map, and as such, I find Respondent's negligence to be very low. Accordingly, based upon these factors and the remaining statutory factors, I conclude that a penalty of $20 is appropriate for the violation herein.

Citation No. 2932311

On October 1, 1987, Kern issued Citation No. 2932311 inasmuch as he observed, in violation of the Roof Control Plan, that Respondent had not installed manways in the No. 2 and No 3 Chutes off the fifth level gangway. Respondent maintains, referring to language on page B of the Roof Control Plan (Gx 4), that the Plan is a minimum Roof Control Plan, and that in lieu of manways, foot barries were installed every 5 feet. The barries were boards 1 inch thick attached to props on the bottom of the chutes, with a height of approximately 3 feet. There were three props across the approximately 15 foot wide chutes, leaving 2 feet on each side of the barries.

I find that the lack of manways to be a clear violation of the Roof Control Plan, which in the section headed protective manways, unequivocally provides as follow: "Protective manways will be installed in the chutes along with development," (Gx 4). Also I note that, as part of the plan, paragraph 12 of the conventional safety precautions provides for "protected manways" where the pitch of the vein exceeds 20 degrees, to protect the miners from sliding and/or falling material, (Gx 4). Paragraph 2 of the conventional safety precautions clearly provides that any changes or deviation from the safety precautions is considered a violation of the Plan, (Gx 4). Respondent relies on paragraph 1 of the conventional safety precautions which indicates the Plan to be a "minimum roof control plan," (Gx 4, p. B). I find this statement to be qualified by the following phrase which appears in the end of that sentence ". . . and was formulated for normal roof and rib conditions while using the mining system described," (Gx 4, p. B). The next sentence requires the operator to provide additional support "in areas where abnormal roof or rib conditions are encountered," (Gx 4, p. B, emphasis added). Hence, it is clear that the terms of the plan are for normal conditions, and additional support is to be provided where "abnormal" conditions are encountered. There is no evidence that in the cited area the conditions were anything other than normal.

There is no evidence that the violation herein was significant and substantial in light of the protective system of the foot barries which were installed at the mine. In the same

fashion, I find that it has not been established in these circumstances that the violation herein was anything more than a low level of gravity. Also, I find that the Respondent acted in good faith in believing that the foot barries provided a safer protection than the manways, and hence believed that the manways were not required. Accordingly, I find that the negligence herein to be low. Taking into account these factors, as well as the remaining factors in 110(i) of the Act, I find that a penalty herein of $20 is appropriate.

Citation No. 2676404

William G. Hughes, a MSHA Inspector, testified, in essence, that on November 9, 1987, he performed an electrical inspection of Respondent's mine. In this inspection he observed a one horsepower fan that contained an electrical connection made by twisting wires. He also observed three-phase wires that were bare and not insulated to the original dielectric insulation strength. 30 C.F.R. 75.514 provides that all electrical connections shall be "electrically efficient." It was Hughes' testimony, which was not contradicted by Respondent or impeached upon by cross-examination, that, in essence, the connection in question was not electrically efficient as the wires being connected could be moved by the fan's vibration, thereby creating sparks and heat. Also, section 75.514, supra, provides, in essence, that all electrical connections ". . . shall be reinsulated at least to the same degree of protection as the remainder of the wire." In this connection, it was Hughes' testimony, which was not impeached upon by cross-examination or rebutted by Respondent, that the three-phase wires were bare, and were not insulated to the original dielectric insulating properties. I thus find that Respondent violated section 75.514, supra.

Rothermel, in essence, testified that the fan motor herein was guarded by a relay to prevent power from going to the fan if the fan would overheat. Accordingly it is Respondent's position that this would tend to diminish somewhat the likelihood of heat to such a degree as to cause an ignition.

It was Hughes' testimony that the type of connection herein could have been moved by the vibration of the fan, thereby creating sparks and heating of the wires. Further, it was Hughes' testimony, in essence, that inasmuch as the three-phase wires were not insulated and 1 inch on each wire was exposed, a ground to frame, or phase to phase connection could have resulted. This in turn could have caused heat or sparks to be produced, leading to an ignition especially if high methane was present. I find Hughes' testimony more persuasive than that of Rothermel. I thus find that the violation herein, of improper connections and bare wires, to have created a discrete safety hazard. Further,

although the fan was not being used at that time, it was capable of being used, and it is clear that it would be used in the normal mining process. Further, evidence presented in Order No. 2932285 and Citation No. 2932286, infra, established the presence of methane when shots are fired in the normal mining process. As such, I conclude that the violation was significant and substantial.

For the same reasons I find the violation to have been of a more than moderate level of gravity. There is no evidence herein to base any finding that the Respondent's negligence was other than low. Taking these factors into account, as well as the remaining statutory factors of section 110(i) of the Act, I conclude that a penalty herein of $100 for the violation to be a proper penalty.

Citation No. 26716405

Hughes issued Citation No. 26716405 alleging that the fan was not provided with a connection to a grounding conductor. Hughes testified that the fan did not have a ground to provide a return to the surface. A violation of 30 C.F.R. 701Ä1(d) was alleged. Section 75.701Ä1, supra, provides for five types of approved grounding. Here, the only facts with regard to the type of grounding, if any, consists of Hughes' testimony that the fan herein should have had a ground to provide a return to the surface. This type of grounding is only one of the five which are approved. There is no evidence that the fan did not have one of the other types of grounds which were approved. In the absence of such testimony, I must conclude that section 75.701 has not been violated, and this Citation must be dismissed.

Citation No. 2676407

Citation No. 2676407 provides, in essence, that a 75 horsepower three-phase pump at Respondent's mine ". . . was not provided with a solid connection to a grounding conductor extending to a low resistance ground field on the surface." The Citation further alleges this to be a violation of 30 C.F.R. 75.701Ä1(d).

Hughes indicated that there was no method provided for grounding of the pump (Tr. 358). He indicated that without a ground, if there is an insulation breakdown or bad connection, there could be a phase to ground connection which could cause ignition if methane were present. He also indicated that a phase to ground connection could cause a person to be electrocuted if one would come in contact with the frame. Hughes also indicated that the pump was located in the third level which is the normal passageway for men at the mine. He also indicated that although

there was a fuse disconnect which had a thermal protection it would be possible still to have a phase to ground overload with the fuses not disconnecting, and which accordingly would be fatal to one touching the frame. Hughes explained that a ground wire was attached to the pump, but the connection to the outside grounding was broken.

It was essentially Rothermel's testimony that there was a grounding wire that went outside to a low resistance ground field, and that he usually inspected it once a day, but does not recall when he last inspected it prior to Hughes' inspection. Hughes then indicated that when he observed the pump when he issued the Citation, the ground wire was attached to the pump, but the connection to the outside ground was broken. I accept Hughes' testimony as to the condition, at the date of the Citation, of the grounding connection, as it was based on his observation. In contrast, Rothermel could not recall when he last inspected the connection prior to Hughes inspection. I conclude, based upon the testimony of Hughes, that the pump was not connected to a ground, and as such would be in violation of 75.701. Further, based upon Hughes' testimony, I conclude that the violation herein to be significant and substantial. Base upon the same reasons, I conclude that the gravity of the violation was high. However, I find credible Rothermel's testimony that he inspected the connection once a day, although he could not recall when he last inspected it prior to the inspection. I thus find that the negligence herein was moderate. Taking the other statutory factors into account, I conclude a violation of $100 is appropriate.

Citation No. 2676410

Citation No. 2676410 alleges a violation of 30 C.F.R. 77.507 in that a disconnect box for the main mine fan ". . . was not safely installed as the box was lying on the ground exposed to rain and moisture."

Hughes testified that the box in question was in the mud and not mounted to exclude moisture. Rothermel testified that the box was 15 inches wide, 2 feet long, and 6 inches deep, and was mounted to railroad ties (8 feet by 8 inches wide by 8 inches high) in the form of cribbing of three ties. Hughes testified that because the box was not grounded, moisture could have grounded out the phases in the box, and that in the event a person would have touched the box to pull the handle, he could have been electrocuted. Hughes also indicated that the "National Electrical Code" requires the box to be vertical so that the handles can be pulled downward and the blades can come down (Tr. 427).

Section 75.507, supra, provides, in essence, that all electrical equipment shall be "permissible." Aside from the opinion of Hughes, no evidence was presented which would indicate that the fan was not permissible. Hughes made reference to an electrical code, but none was offered in evidence. I find Rothermel's testimony credible with regard to the placement of the box in question on cribbing made of railroad ties. I thus find that section 75.507 has not been violated and this Citation should be dismissed.

Citation No. 2676411

Hughes also issued Citation No. 2676411, which states that the fan motor was not provided with a "solid connection" to a grounding conductor extending to a low resistance ground field, and accordingly 30 C.F.R. 77.701Ä1(c) had been violated. Hughes testified, in essence, that the fan was not provided with "a source" for return back to the original source, (Tr. 413). He said that he did not observe any grounding from the motor to the disconnect box, and that a wire which was attached from the motor to a ground rod would not have provided a return to the source. He explained that in such a situation there would have been a difference in potential. He was asked where the connection for the grounding would have run, and he stated that the ground wire "would have been connected" to the frame of the disconnect box, (Tr. 414). Rothermel indicated that the morning before or after the Citation was issued, he was out at the fan and the ground was hooked up. On cross-examination he indicated the electrical examinations are made weekly, and he would have checked the ground wire, by looking at it, at the last examination. He further indicated the ground wire, that was fastened to the motor, did not go to the quadruplex, but did go to a ground stake.

Based on Hughes's testimony, I conclude that on the day the Citation was issued, the fan did not have proper grounding, and as such, section 701Ä1, supra, was violated.

The Citation alleges the violation to have been significant and substantial. The only evidence bearing on this issue is Hughes' testimony that, in essence, if a person was to have contacted the fuse disconnect box that had been energized, he would have been electrocuted. He indicated that the box had "some unused opening" which would allow moisture in the box, which would make it to become moisturized, (Tr. 413). However, the Citation was issued for improper grounding for the fan. Thus, it has not been established the specific hazards, and the likelihood of any injury as a consequence of the fan not being grounded. I thus find the violation not to be significant and substantial.

For the same reasons, I find the evidence insufficient to conclude that the violation herein was more than a low level of gravity. I have taken into account Rothermel's testimony that when he examined the grounding, it was hooked up. However, he indicated that the grounding did not go to the quadruplex, which appears to be the source, but to a ground stake. I thus find Respondent to have acted with a moderate degree of negligence in the violation herein. I have also considered the remaining statutory factors and conclude that a penalty of $75 is appropriate for the violation herein.

Citation No. 2932441

At the hearing, the Parties indicated that, in essence, Citation No. 2932441 is the same or similar to Citation No. 2676225. As such, testimony on this Citation was waived. Based on the evidence adduced and discussed in Citation No. 2676225, infra, I conclude that Citation No. 2932441 was properly issued and established a violation of 30 C.F.R. 50.30, and that a penalty of $20 is appropriate.

ORDER

Accordingly, it is ORDERED that: Citation Nos. 2676133, 2676135, 2932312, 2932311, 2676409, and 2676411 be modified to delete any findings that the cited violations are significant and substantial.

It is further ORDERED that Citation Nos. 2676177, 2676405, 2676409, and, 2676410 are vacated.

It is further ORDERED that Withdrawal Orders 2676178, 2677518, and 2932225 were properly issued.

It is further ORDERED that Respondent shall pay $5,065, within 30 days of this Decision, as Civil Penalties for the violations found herein.

Avram Weisberger
Administrative Law Judge